

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 391

RICHARD RICE, PETITIONER,

vs.

NEIL OLSON, WARDEN OF THE NEBRASKA STATE  
PENITENTIARY AT LANCASTER, LANCASTER  
COUNTY, NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF NEBRASKA

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**IN THE DISTRICT COURT OF LANCASTER COUNTY,  
NEBRASKA**

Habeas Corpus. No. X-48 Civil

RICHARD (DICK) RICE, Petitioner,

versus

NEIL OLSON, Warden of the Nebraska State Penitentiary at  
Lancaster, Lancaster County, Nebraska, Respondent

PETITION FOR WRIT OF HABEAS CORPUS—Filed July 30, 1943

To the Honorable Jefferson H. Broady, Judge of the above  
entitled Court:

**Jurisdiction**

The statutory provisions giving this Court jurisdiction to issue the writ requested is to be found in Chapter 29-2801 et seq., Chapters of the Compiled Statutes of Nebraska for 1929, and as far as here material declare that:

“If any person, except persons convicted of some crime or offense for which they stand committed, or persons committed for treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of [fol. 6] commitment, now is or shall be confined in any jail of this state, or shall be unlawfully deprived of his or her liberty, and shall make application, either by him or herself or by any person on his or her behalf, to any one of the judges of the district court, or to any county judge, and does at the same time produce to such judge a copy of the commitment or cause of detention of such person, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of habeas corpus, which writ shall be issued forthwith by the clerk of the district court, or by the county judge, as the case may require, under the seal of the court whereof the person allowing such writ is a judge directed to the proper officer, person or persons who detain such prisoner. “Compare, *Smith v. O’Grady*, 312 U. S. 329; *Williams v. Olson*, — Neb. —, 8 N. W. (2d) 830; *Williams v. Olson*, 317 U. S. —, 87 L. ed. —, 63 Sup. Ct. 431.

### Showing

Your Petitioner in 1942, filed a similar petition in this court and was filed as No. Doc. W. Page 274, which case was dismissed on the grounds that it failed to state a cause of action, and on December 9, 1942, an appeal was allowed, filed in the Supreme Court of Nebraska, "General Number 31602," that court affirmed and dismissed said cause for failure of Appellant), (Petitioner) to comply with rule 3 requiring printed brief which rule has been abolished by the Nebraska Legislature May 20, 1943, your Petitioner filed a similar petition in the District Court of the United States for the District of Nebraska and was given cause No. 169 Civil and the case was dismissed in that it was not one of those "rare and exceptional cases requiring the intervention of the Federal Courts"; On May 24, 1943, the Supreme Court of the United States denied your Petitioner leave to file a petition for writ of habeas corpus; on October 5th, 1942, the District Court of Thurston County, Nebraska, denied your Petitioner relief by writ of error coram nobis, [fol. 7] for a correction of sentence. Regardless of the foregoing your petitioner is not barred from having his case adjudicated on its merits at this time. Compare, Williams v. Olson, — Neb. —, 8 N. W. (2d) 830. See also, Ex Parte Williams et al., 317 U. S. —, 63 Sup. Ct. 431.

Your Petitioner Richard (Dick) Rice, respectfully shows to this Honorable Court as follows:

Your Petitioner is actually, unlawfully imprisoned and restrained of his liberty without due process of law, in that his Trial, Conviction and Commitment entered by the District Court of Thurston County, Nebraska, are unconstitutional and void; in that they are based on a swift, reckless sham and pretense of a trial; in violation of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States, and your Petitioner is detained in the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, and is in the custody of Neil Olson, Warden of the aforesaid Penitentiary which is located within the jurisdiction of this Court, made under the following circumstances:

1. Your Petitioner a Winnebago Indian by birth a resident of Winnebago, Nebraska, a Ward of the Federal Government, on June 10th, 1935, was tried and convicted in

the District Court of Thurston County; Pender, Nebraska, on the information of the County Attorney "charging the offense of breaking and entering a building located in Thurston County, Nebraska, and carrying away property of the value of Thirty-five (\$35.00) Dollars," and was sentenced to a term of one (1) years confinement in the men's Reformatory at Hawthorne, near Lincoln, Nebraska, served ten months (10), and was discharged from said penal institution April 10th, 1936, this statement is made for the sole purpose of showing the Court that his sentence hereinafter pronounced by the Court for a period of from one (1), to Seven (7), years confinement in the Nebraska State Penitentiary entered October 14, 1940, is illegal unconstitutional and void.

[fol. 8] 2. Thereafter on the 22nd day of May, 1940, the D. A. on his information charged your Petitioner with the offense of breaking and entering, in the words and figures as follows to-wit: "State of Nebraska, County of Thurston,) ss. In the District Court of the Eighth Judicial District of Nebraska, in and for — County. The State of Nebraska, Plaintiff, vs. Joe Bigbear and Dick Rice, Defendant) Information #5173 Be It Remembered. That Alfred D. Raun, County Attorney in and for Thurston County, and in the Eighth Judicial District of the State of Nebraska, who prosecutes in the name and by the authority of the State of Nebraska, comes here in person into Court at this the February Term A. D. 1940, thereof, and for the State of Nebraska gives the Court to understand and be informed that Joe Bigbear and Dick Rice late of the county aforesaid, did, on the 17th day of May A. D. 1940, in the County of Thurston and the State of Nebraska aforesaid, then and there being, did then and there unlawfully, willfully, maliciously, feloniously and forcefully break and enter into a certain dining hall in the Village of Winnebago in said county and state, then and there situate; that said dining hall is owned by the Winnebago Indian Mission of the Reform Church in America; with the intent of them the said Joe Bigbear and Dick Rice then and there to steal property of the value contained in said building, "Filed in District Court May 22, 1940; Moris Rasmussen, Clerk." State of Nebraska Thurston County) ss. I Moris Rasmussen Clerk of the District Court of said County, hereby certify that the above and foregoing is a true and correct



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copy of the original now of record in this office. In testimony whereof I have hereunto set my hand and affixed the seal of said Court this 11th day of October A. D. 1942 Moris Rasmussen Clerk of the District Court.

Contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Nebraska. Alfred D. Raun, County Attorney." (Omitting endorsements on back of Information.)

[fol. 9] 3. Thereafter, on the 14th day of October, 1940, your Petitioner was illegally, unlawfully without jurisdiction or authority of law arraigned in the District Court of Thurston County, Nebraska (hereinafter referred to as the Trial Court) tried and convicted in less than twenty (20) minutes in the words and figures as follows to-wit:

"In The District Court of Thurston County, Nebraska.

The State of Nebraska, Plaintiff, vs. Dick Rice, Defendant.)

No. 5173 *Journal Entry* Now on this 14th day of October, A. D. 1940, the same being one of the Judicial days of the October, A. D. 1940, term of said court: Defendant having waived a preliminary hearing in the county court and now being brought before the court for arraignment upon the information; this cause came on for hearing upon the information filed herein. The state appearing by said County Attorney and the Defendant appearing in person. The Defendant was thereupon arraigned upon the information filed herein for burglary and after the same was read to him in open court, and he was asked how he ple-d thereto, to which he replied, "Guilty".

The court thereupon read Section 28-538, C. S. 1929, Nebraska, and asked the Defendant, if after knowing what penalty would be inflicted upon him under his plea of guilty, he still desired to plead guilty, to which question of the court, he replied in the affirmative.

Whereupon the Defendant was asked if he had anything to say why judgment should not be passed upon him, the Defendant replied that he had nothing to say.

The statement of the County Attorney was then read.

The Court thereupon passed judgment and sentence of the court upon the defendant, as follows: It is the judgment and sentence of the Court that you be confined in the penitentiary of the State of Nebraska, at hard labor, no part of which shall be in solitary confinement and Sun-

days and holidays excepted as to hard labor, for a period of from one, (1), to seven, (7), years, and pay the costs of [fol. 10] prosecution, and that you be committed to the custody of the Sheriff of Thurston County, Nebraska, who will see that you are conveyed to the above institution for execution of this sentence, By the Court: Mark J. Ryan District Judge "Filed October 14, 1940; Moris Rasmussen, Clerk Dist. Court." State of Nebraska Thurston County) ss. I, Moris Rasmussen Clerk of the District Court of said County, hereby certify that the above and foregoing is a true and correct copy of the original now of record in this office. In testimony whereof I have hereunto set my hand and affixed the seal of said court this 9th day of October, 1942, Moris Rasmussen, Clerk of the District Court."

4. Upon the arraignment (set out in paragraph 3) the record bespeaks the truth that the Trial Court did not advise your Petitioner of his Constitutional rights to the assistance of Counsel and witnesses for his defense; nor the right to be charged and informed of the nature and cause of the accusation by indictment or presentment of a Grand Jury guaranteed by the Fourteenth, Fifth and Sixth Amendments of the Constitution of *of* the United States; nor the right to trial by jury guaranteed by Art. I, Sec. 6; Nebr. Const; nor did your Petitioner herein waive those constitutional rights either by action or words. It is well settled in this State that the rights afforded a person either by statute or the Constitution he cannot waive even by an agreement of the parties. Compare, *Michaelson v. Beemer*, 72 Neb. 761, 101 N. W. 1007. See also, *Ex Parte M'Clusky*, 40 Fed. Rep. 71; *Smith v. O'Grady*, 312 U. S. 329.

In the instant case the record bespeaks the truth that your Petitioner was tried and convicted before a Court of incompetent jurisdiction, in that he was deprived of his Constitutional right to due process of law in this to-wit:

(a) In that no jurisdiction rested in the trial Court to take cognizance of the offense alleged in the information or the person of the accused, in that the alleged crime was committed on an Indian Reservation Government property [fol. 11] without and beyond the Jurisdiction of the Trial Court. Compare, *Miller v. McLaughlin*, 118 Neb. 174; 224 N. W. 184-281 U. S. 261.

(b) In that the Trial Court failed to complete the Court before placing your Petitioner upon his defense by an assignment of Counsel; empaneling of a trial jury. Compare, *Smith v. O'Grady*, 312 U. S. 329; *Michaelson v. Beemer*, 72 Neb. 761, 101 N. W. 1007; See also *Boyd v. O'Grady*, 121 Fed. (2d) 146; *Johnson v. Zerbst*, 304 U. S. 458;

(c) In that the judgment of conviction is unconstitutional and void, in that the Trial Court imposed an indeterminate sentence rather than a flat or definite sentence as by law made and provided in that your Petitioner had previously served a sentence in a penal institution of the State of Nebraska at the mens Reformatory at Hawthorne, Nebraska. Compare, C. S. Neb. 1929, Chap. 29-2620, in violation of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States.

And furthermore my alleged accomplice was and had been previously convicted and served time for felonies and was given a stay on probation. Your Petitioner is an Indian of the Winnebago Tribe, located in the State of Nebraska, Thurston County, Nebraska, but no part of the State of Nebraska, exclusive under the jurisdiction of the Federal Government all without and beyond the jurisdiction of the Trial Court. Your Petitioner is Thirty (30) years of age, after being confined in the Nebraska State Penitentiary for 18 months he was informed that his proper remedy to correct the aforesaid mentioned deprivation of his liberty by a court without jurisdiction so to do, he employed counsel who advised him that his proper remedy was to file a Writ of error coram nobis with the Trial Court, petitioners Sister paid said Counsel a fee of Seventy-five (\$75.00) Dollars to prepare and file said petition for writ of error coram nobis in the Trial Court which petition was on October 5, 1942, dismissed for want of prosecution on the part of Counsel. Your petitioner is ignorant of the science of law, has never [fol. 12] studied law, and has no one to champion his cause of action only the assistance of a fellow inmate. Under all these circumstances he is entitled to be released upon his petition. Compare, *Brown v. Mississippi*, 297 U. S. 278; *Boyd v. O'Grady*, 121 Fed. (2d) 146. And further if the Trial Court had of assigned competent and serious counsel as by law made and provided under the provisions of Chap. 29-1803 C. S. Neb. 1929; Const. Amend., U. S., guaranteed by the Fourteenth Amendment of the Constitu-



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tion of the United States, to guard and enforce those rights refered to above, which was mandatory and given your petitioner a fair and impartial trial your Petitioner would of been able to convince the court that no jurisdiction rested in the Trial Court to take cognizance of the offense or the accused. Compare, *Powell v. Alabama*, 278 U. S. 45; *Penn Mut. Life Ins. Co. v. Creighton Theatre Bldg. Co., et al.* 54 Neb. 228, 74 N. W. at p. 584; *Smith v. O'Grady*, 312 U. S. 329. And further your Petitioner was deprived of his Constitutional right to be informed of the nature and cause of the accusation before being placed on his defense, in that he was deprived of the right to be served with a copy of the accusation and twenty-four (24) hours within which to examine the charge and prepare a defense, this allegation also is supported by the record. Compare, *Zink v. State*, 34 Neb. 37, 51 N. W. 294; *State v. Robertson*, 55 Neb. 41, 75 N. W. at p. 38; *Smith v. O'Grady*, 312 U. S. 329.

Your Petitioner alleges that by reason of the foregoing, that his Trial, Conviction and Commitment deprived him of his liberty without due process of law, in that they are unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation of the guarantee contained in the Fourteenth amendment of the Constitution of the United States, in this, to-wit:

(a) In that no jurisdiction rested in the Trial Court to proceed to judgment of conviction;

(b) In that your Petitioner was deprived of his Constitutional right to the assistance of Counsel and trial by [fols. 13-14] jury;

(d) In that he was illegally sentenced to an indeterminate sentence;

(c) In that the alleged crime was committed without and beyond the jurisdiction of the trial court.

And that he has been deprived and continues to be deprived of his liberty without due process of law, and have been deprived of his constitutional right to a judicial process by which he may extricate himself from false imprisonment.

Wherefore, your Petitioner having shown and alleged that his trial and conviction deprived him of his liberty without due process of law, as aforesaid, prays that a writ

of habeas corpus may issue, directed to Neil Olson, Respondent, to bring and have your Petitioner before this Court forthwith, together with the true cause of his detention, to the end that due inquiry may be had in the premises, and that this Court may proceed in a summary way to determine the facts and the legality of your Petitioner's imprisonment, restraint and detention, and thereupon to dispose of your Petitioner as law and justice may require, by releasing him from false imprisonment and that he go hence without day.

Richard Rice, Petitioner.

*Duly sworn to by Richard Rice. Jurat omitted in printing.*

[fol.15] IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER DISMISSING PETITION—August 11, 1943

The application for a writ of Habeas corpus is denied and petition is hereby dismissed.

The petition, on its face, shows that a similar petition was filed and dismissed in this court in 1942; that an appeal therefrom was dismissed by the Supreme Court. The petition also states that a similar petition was filed in the United States District Court and which was also dismissed by that court. Thereafter, the Supreme Court of the United States denied leave to file an original application for a writ in that court.

No grounds is shown for the issuance of the writ prayed for. Therefore, the petition is dismissed and the application denied.

Dated at Lincoln, Nebraska, this 11 day of August, 1943.

By the Court: J. H. Broady, District Judge.

[fol. 16] IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed August 17, 1943

Comes now the Petitioner in the above entitled and Numbered cause of action, the Movant herein, and respectfully prays the Court for an order to set aside the order

and judgment of the Court entered on August 11th, 1943, dismissing Petitioner's petition for writ of habeas corpus, and to grant him a hearing and the assistance of Counsel and the right to prove his allegations set out in the petition for writ of habeas corpus originally filed in this Court and for cause states, the following good and sufficient reasons, to-wit: The Court erred:

I. In not holding that Petitioner's Trial, Conviction and Commitment entered by the District Court of Thurston County, Nebraska, deprived him of his liberty without due process of law, in that said Trial, Conviction and Commitment are unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States, in this, to-wit:

(a) In that no jurisdiction rested in the Trial Court to proceed to judgment of Conviction;

(b) In that your Petitioner was deprived of his Constitutional right to be informed of the nature and cause of the accusation of which he was convicted as by law made and provided;

(c) In that your Petitioner the Movant herein was deprived of the Constitutional right to the assistance of Counsel and trial to jury;

[fols. 17-21] (d) In that your Petitioner was illegally sentenced to an indeterminate sentence.

(e) In that the alleged crime was committed without and beyond the jurisdiction of the Trial Court;

And that he has been deprived and continues to be deprived of his liberty without due process of law, and has been deprived of his Constitutional right to a judicial process by which he may extricate himself from false imprisonment, in violation of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States.

Wherefore, Your Petitioner respectfully prays that the judgment and order of the Court entered August 11th, 1943, dismissing the petition for writ of habeas corpus be set aside and held for naught and a new trial awarded, and petitioner discharged as law and justice require.

Richard Rice, Richard (Dick) Rice.

[fols. 22-36] IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—Aug. 26, 1943

This cause now comes on to be heard on motion of petitioner to set aside the judgment of the Court heretofore rendered and entered herein and for a new trial of this case, and is submitted to the Court, on due consideration whereof, the Court doth overrule said motion.

[fols. 37-38] IN SUPREME COURT OF NEBRASKA

No. 31735

In re Application for Writ of Habeas Corpus. RICHARD  
(DICK) RICE, Petitioner, Appellant,

v.

NEIL OLSON, Warden of the Nebraska State Penitentiary at  
Lancaster, Lancaster County, Nebraska, Respondent,  
Appellee

Appeal from the District Court of Lancaster County

JUDGMENT—April 7, 1944

This cause coming on to be heard upon appeal from the district court of Lancaster county, was submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, affirmed; that appellee recover of and from appellant his costs herein expended, taxed at \$—; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Robert G. Simmons, Chief Justice.

[fol. 39] IN SUPREME COURT OF NEBRASKA

31735

In re Application, RICE,

v.

OLSON

1. The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him.

2. When a defendant enters a plea of guilty, he thereby waives all defenses, other than those that are jurisdictional.

3. The acceptance of a plea of guilty authorizes the imposition of the legal sentence for the crime properly charged in the information.

OPINION—Filed April 7, 1944

[fol. 40] Heard Before Simmons, C. J., Paine, Carter, Yeager, Chappell and Wenke, JJ.

PAINE, J.:

This matter comes before this court upon a petition filed by Richard (Dick) Rice in the district court for Lancaster county, praying that a writ of habeas corpus may issue. This application was denied by the district court.

On July 30, 1943, a petition was filed in the district court for Lancaster county, which sets out that the petitioner is a Winnebago Indian by birth, and a resident of Winnebago, Nebraska, and is a ward of the federal government; that on June 10, 1935, he was tried and convicted in the district court for Thurston county at Pendler on an information of the county attorney charging him with the offense of breaking and entering a building located in Thurston county, and carrying away property of the value of \$35, and was sentenced to a term of one year in the men's reformatory near Lincoln, Nebraska, and served ten months, and was discharged on April 10, 1936.

This petition then charges that thereafter on May 22, 1940, an information was filed, charging petitioner and one



Joe Bigbear with forcibly breaking and entering into a certain dining hall in the village of Winnebago on May 17, 1940, which dining hall is owned by the Winnebago Indian Mission [fol. 41] of the Reform Church in America, with the intent to steal property of value contained in said building, and on October 14, 1940, defendant waived preliminary hearing in the county court and was arraigned upon information filed for burglary in the district court and pleaded guilty thereto; that thereupon section 28-538, Comp. St. 1929, was read to him, and he was then asked if, after knowing what penalty could be inflicted upon him under his plea of guilty, he still desired to plead guilty, to which question of the court he replied in the affirmative, and having stated that he had nothing to say before sentence was pronounced he was thereupon sentenced to hard labor in the penitentiary for a period of one to seven years by the district court.

It is charged that the trial court did not advise the petitioner of his constitutional rights to have counsel and witnesses, or to be charged and informed against by indictment of a grand jury, which is guaranteed under the Fourteenth, the Fifth, and the Sixth Amendments to the Constitution of the United States, nor of his right to a trial by jury, guaranteed by section 6, art. I of the Nebraska Constitution, and that said petitioner did not waive those constitutional rights either by action or words, and that such rights cannot be waived by agreement of the parties, and it is charged that he was convicted by a court of competent jurisdiction and deprived of his constitutional right of due process of law; that no jurisdiction rested in the [fol. 42] trial court, or over the person of the accused, because the alleged crime was committed on an Indian reservation and without and beyond the jurisdiction of the trial court.

It is also charged that judgment of conviction is unconstitutional and void in that the trial court imposed an indeterminate sentence of from one to seven years instead of a flat or definite sentence, as by law required, in that petitioner had previously served a sentence in a penal institution at the men's reformatory. See Comp. St. 1929, sec. 29-2620.

It is further charged in said petition that the petitioner is an Indian of the Winnebago tribe, and the same is under

the exclusive jurisdiction of the federal government, and without the jurisdiction of the trial court.

The petitioner further charges that, after being confined in the Nebraska state penitentiary for 18 months he employed counsel, who advised him that his proper remedy was to file a writ of error *coram nobis* with the trial court, and petitioner's sister paid said counsel \$75 to prepare said petition, which petition was dismissed October 5, 1942.

It is further charged that under section 29-1803, Comp. St. 1929, it was mandatory upon the district court to assign counsel to guard and enforce rights guaranteed under the Fourteenth Amendment to the United States Constitution.

[fol. 43] It is further charged that he was deprived of his right to be served with a copy of the information and given 24 hours thereafter within which he might examine the charge and prepare a defense.

Because of these allegations, the petitioner prays that a writ of habeas corpus may issue, directing Neil Olson, warden of the penitentiary, to bring the petitioner before the court to determine the facts and legality of the petitioner's imprisonment and dispose of the petitioner as law and justice may require, and release him from such false imprisonment, and that he may go hence without day.

The federal Constitution does provide, in article V of the Amendments, as charged in the petition, that no person shall be held to answer for a crime such as was charged in this case unless upon an indictment of a grand jury, but section 10, art. I of the Constitution of Nebraska provides that the legislature may provide for holding such persons upon the information of the public prosecutor, and section 26-901, Comp. St. 1929, provides that when a county attorney has sufficient evidence he is authorized to file such proper complaint as was done in this case, in strict accordance with the Nebraska Constitution and laws.

It is also claimed in the petition that the petitioner is a Winnebago Indian and is under the exclusive jurisdiction of [fol. 44] the federal government, and without the jurisdiction of the district court of Nebraska. However, chapter 15, title 18, U. S. C. A., sec. 548, of the federal Penal Code, provides generally that all Indians committing a crime, either within or without an Indian reservation within the boundaries of a state, shall be subject to the same laws, and tried

in the same courts, and subject to the same penalties as all other persons.

It is contended that it was mandatory for the district court to assign counsel to assist the defendant. In *Alexander v. O'Grady*, 137 Neb. 645, 290 N. W. 718, and *Davis v. O'Grady*, 137 Neb. 708, 291 N. W. 82, this court has adopted the rule to be: "The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him." 16 C. J. 821.

"It is not necessary that there be a formal waiver; and a waiver will ordinarily be implied where accused appears without counsel and fails to request that counsel be assigned to him, particularly where accused voluntarily pleads guilty." 23 C. J. S. 314, sec. 979.

Judge Parker, of the Fourth Circuit Court of Appeals, said: "We do not think that the plea of guilty was vitiated or that the sentence imposed was avoided by reason of the fact that appellant was not represented by counsel in the District Court. Where an accused personally enters a plea [fol. 45] of guilty to a crime whereof he stands charged, and does so understandingly, freely and voluntarily without asking the assistance of counsel, a waiver of the right to be represented by counsel may fairly be inferred. *Logan v. Johnston*, D. C., 28 F. Supp. 98; *Erwin v. Sanford*, D. C. 27 F. Supp. 892." *Cundiff v. Nicholson*, 107 Fed. 2d 162.

It is charged that petitioner was deprived of his right to be served with a copy of the accusation and given 24 hours within which to examine the charge and prepare his defense. It is contended that this is a substantial right which it is error to deny. The case of *Zink v. State*, 34 Neb. 27, 51 N. W. 294, is cited, but in that case *Zink* did not plead guilty, while in the instant case the defendant did enter such a plea.

"A defendant, by pleading guilty, waives all defenses other than that the indictment charges no offense." 14 Am. Jur. 952, sec. 272.

"A plea of guilty, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order, the effect of which is to authorize the imposition of the sentence prescribed by law on a verdict of guilty of

the crime sufficiently charged in the indictment or information." 14 Am. Jur. 952, sec. 272.

"A plea of guilty admits all facts sufficiently pleaded, [fol. 46] confesses the indictment or information to be wholly true, with respect to each and every allegation, operates as a waiver of any defense, and of the constitutional right to a trial by jury, and with it, of course, the constitutional guarantees with respect to the conduct of criminal prosecutions." 2 Standard Ency. of Procedure, 895.

"A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement." 16 C. J. 403." State ex rel. Gossett v. O'Grady, 137 Neb. 824, 291 N. W. 497.

In the case at bar, as the record shows affirmatively that the defendant had pleaded guilty, this absolutely waived this and all other preliminary steps in connection therewith, so this allegation has no merit.

In this petition for habeas corpus, it is charged that the sentence is unconstitutional and void because it is an indeterminate sentence of one to seven years after he had served a previous sentence on a similar charge.

The present record does disclose his prior sentence of one year to the state reformatory for a felony, and it appears that the legislature did not contemplate that a second indeterminate sentence should be given. The trial court, either through inadvertence or misapprehension, appears to have given a different sentence, that is, a lighter sentence than might have been given. This frequently [fols. 47-54] occurs when an entire stranger is arrested in our state and claims it is his first felony and receives an indeterminate sentence as a first offender, but when it appears somewhat later that he was actually a second offender, that does not make the sentence given illegal or void. Doubtless the board of paroles and pardons can consider such facts in later consideration of the exact time of his discharge.

In *McElhaney v. Fenton*, 115 Neb. 299, 212 N. W. 612, the trial court gave sentence of not less than three years nor more than twenty years, while the statute provided that the maximum sentence should not be more than ten years. It was held that, while the sentence was erroneous, it was not void, and it would stand for the term that the law au-

thorized. It was held that on an application for a writ of habeas corpus, errors and irregularities, not jurisdictional, will not be considered.

In the case of *Hulbert v. Fenton*, 115 Neb. 818, 215 N. W. 104, it was said that habeas corpus is a collateral, and not a direct, proceeding as a means of an attack upon a judgment and sentence regular upon its face, and no extrinsic evidence is admissible in a habeas corpus proceeding to show its invalidity. See *In re Evans*, 173 Mich. 25, 138 N. W. 276.

The judgment of the trial court was right, and it is hereby affirmed.

Affirmed.

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[fols. 55-68] IN SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER DENYING REHEARING—June 9, 1944

This cause coming on to be heard upon motion of appellant for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.

Robert G. Simmons, Chief Justice.

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[fol. 69] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—October 16, 1944

On consideration of the motion for leave to proceed herein in forma pauperis

It is ordered by this Court that the said motion be, and the same is hereby granted.



[fol. 70] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 16, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of Nebraska is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: In forma pauperis. Enter petitioner pro se. File No. 48,844. Nebraska, Supreme Court. Term No. 391. Richard Rice, Petitioner, vs. Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska. Petition for a writ of certiorari and exhibit thereto. Filed August 24, 1944. Term No. 391 O. T. 1944.

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